

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER,

Plaintiff,

VS.

UNITED STATES OF AMERICA ET.AL.,

Defendant's.

CIVIL ACTION NO. 05-147-ERIE

APPEALS COURT NO. 07-1036

**FILED**

NOV 20 2007

CLERK U.S. DISTRICT COURT  
WEST. DIST. OF PENNSYLVANIA

## PLAINTIFF'S MOTION FOR A BENCH TRIAL

NOW COMES, the Plaintiff DARRYL ORRIN BAKER, (hereinafter "PLAINTIFF"), and proceeding **pro-se**, and respectfully moves this Honorable Court in the interest of justice to **grant** the plaintiff a **Bench Trial** because the United States Government et.al., ("DEFENDANT'S"), has decline the plaintiff's **offer** in this settle this case, and for the reasons that follow.

TITLE 28 U.S.C. § 2402

(1) Subject to Chapter 179 of this Title [28 U.S.C. § 3901 et. seq.], any action against the United States under Section 1346 shall be tried by the Court without a jury, except that any action against the United States under 1346(a)(1) shall, at the request of either party to such action, be tried by the Court with a jury.

- (i) 28 USCS § 2402 insofar as it deprives plaintiff of jury trial of tort claim in federal district court, is constitutional.

- (ii) Provision of predecessor statute to 28 USCS § 2402 which required actions against United States to tried without jury was applicable to actions brought in District Court as well as to action in Court of Claims.

The plaintiff is aware that Title 28 U.S.C. § 2402 bares the right to a jury trial against the United States. Therefore, the plaintiff **Demand a Bench Trial** in this case. See Gotha v. United States, 115 F.3d 176 (3rd Cir.1997).

#### BENCH TRIAL

Black Law Dictionary states:

##### **Bench Trial:**

A trial before a judge without a jury.  
The Judge decides question of fact as  
well as question of law.

(2) On June 4, 2007, the Appeals Court for the Third Circuit denied the Defendant's Motion for Summary Action in this case. See (ATTACHMENT 1).

(3) On August 7, 2007, this Honorable Court Chief Magistrate Judge Susan Paradise Baxter **Ordered** a Case management Conference Hearing on August 16, 2007. See (ATTACHMENT 2).

(4) At this Case Management Conference Hearing that was held on August 16, 2007, the Defendant's told the plaintiff to present a **offer** to settle the medical negligence claim.

(5) The Plaintiff presented a offer to the Defendant's, and the Defendant's declined this offer stating that this offer was to excessive, but also stated the, (" IF YOU LIKE TO DISCUSS ANY OTHER MATTER IN THIS CASE, KINDLY DIRECT IT TO MY ATTENTION AT

THE ABOVE ADDRESS.") See (ATTACHMENT 3).

(6) The plaintiff presented a second offer to the Defendant's and the plaintiff has not heard anything from the Defendant's to this second offer.

CONCLUSION

Based on the foregoing, the Plaintiff DEMAND A BENCH TRIAL, because the Defendant's decline the Plaintiff's offer the settle this case. Also, the Plaintiff request a Bench Trial in the Plaintiff's First and Second Amended Complaint against the Defendant's and the Plaintiff request that this Honorable Court follow the Appeal's Court instruction to **certify** all claims as final as Rendell, Smith, and Jordan, instructed pursuant to Rule 54(b), certification of all claims for appeal review. See (ATTACHMENT 1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I the Plaintiff has sent a true and exact copy of the foregoing motion for a Bench Trial this day 14, November 2007, United States First Class Mail to the Following.

Assistant United States Attorney  
Paul E. Skirtich  
U.S. Post Office & Courthouse  
700 Grant Street  
Suite 4000  
Pittsburgh, Pennsylvania  
15219

EXECUTED: NOVEMBER 14, 2007.

Respectfully submitted  
BY: Darryl Orrin Baker  
Darryl Orrin Baker  
Reg. No.# 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN  
55072

(ATTACHMENT 1)

CLD-245

May 24, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 07-1036

DARRYL ORRIN BAKER

VS.

UNITED STATES OF AMERICA, ET AL.

(W. D. Pa. Civ. No. 05-cv-00147E)

Present: RENDELL, SMITH AND JORDAN, CIRCUIT JUDGES

Submitted are:

- (1) By the Clerk for possible dismissal due to a jurisdictional defect;
- (2) Appellee's motion for summary action;
- (3) Appellant's response to possible dismissal due to a jurisdictional defect;
- (4) Appellant's response to motion for summary action;

in the above-captioned case.

Respectfully,

Clerk

MMW/MPD/jc/par

O R D E R

The foregoing appeal is dismissed for lack of appellate jurisdiction. We have jurisdiction over appeals from final orders of the district court. See 28 U.S.C. § 1291. Orders that fail to dispose of all claims against all parties are not final and appealable orders unless the district court expressly and properly enters judgment and determines that there is no just reason for delay under Federal Rule of Civil Procedure 54(b). See, e.g., In re Good Deal Supermarkets, Inc., 528 F.2d 710, 712 (3d Cir. 1975). The District Court's memorandum order is not final under § 1291 because it did not dispose of all claims

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against all parties. An order dismissing a complaint without prejudice is generally not a final and appealable order. Brennan v. Kulick, 407 F.3d 603, 606 (3d Cir. 2005). Here the District Court dismissed the appellant's medical negligence claim but did so without prejudice and with the indication that the claim would later be permitted to proceed. Accordingly, the dismissal order is clearly not final or appealable. Furthermore, there was no request for either the Magistrate Judge or the District Court to certify the decision under Rule 54(b). Therefore, neither Judge ever considered whether the ruling should be certified for immediate appeal. The memorandum order also does not fall under the collateral order doctrine because dismissal of claims on account of sovereign immunity may be effectively reviewed on appeal from the final judgment. See, e.g., Kassuelke v. Alliant Techsystems, Inc., 223 F.3d 929, 931 (8th Cir. 2000). Because the Court lacks appellate jurisdiction, appellee's motion for summary action, requesting that the Court affirm the memorandum order, is denied.

By the Court,

/s/ D. Brooks Smith

Circuit Judge

Dated: June 7, 2007

par/cc: Mr. D.O.B.

R.L.E., Esq.

L.S.I., Esq.

**(ATTACHMENT 2)**

## Other Orders/Judgments

1:05-cv-00147-SJM-SPB BAKER v. UNITED STATES, et al

U.S. District Court

Western District of Pennsylvania

### Notice of Electronic Filing

The following transaction was entered on 8/7/2007 at 10:32 AM EDT and filed on 8/7/2007

**Case Name:** BAKER v. UNITED STATES, et al

**Case Number:** 1:05-cv-147

**Filer:**

**Document Number:** No document attached

### Docket Text:

TEXT ORDER: Case Management Conference set for 8/16/2007 11:00 AM via telephone before Susan Paradise Baxter. Counsel for Defendants is directed to make arrangements for all parties to participate by conference call on the above date and time. Text-only entry; no PDF document will issue. This text-only entry constitutes the Court's order or notice on the matter. Signed by Judge Susan Paradise Baxter on 8/7/07. (lrw)

### 1:05-cv-147 Notice has been electronically mailed to:

Paul E. Skirtich paul.skirtich@usdoj.gov, carol.friedrich@usdoj.gov, usapaw.ecfcivil@usdoj.gov

### 1:05-cv-147 Filer will deliver notice by other means to:

DARRYL ORRIN BAKER  
19613-039  
FEDERAL CORRECTIONAL INSTITUTION  
PO BOX 1000  
SANDSTONE, MN 55072



**(ATTACHMENT 3)**



United States Attorney  
Western District of Pennsylvania

PES:caf

U.S. Post Office & Courthouse  
700 Grant Street  
Suite 4000  
Pittsburgh, Pennsylvania 15219

412/644-3500

August 28, 2007

Darryl Orrin Baker  
Reg. No. 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN 55072

RE: Darryl Orrin Baker v. United States of America  
Government Officials at FCI-McKean, Warden, Officer B.  
Wesemen, Medical Department  
Civil Action No. 05-147E

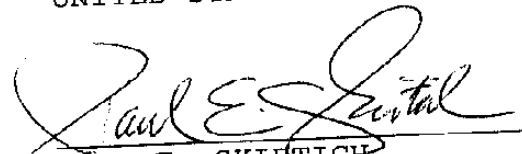
Dear Mr. Baker:

After review of your letter dated August 21, 2007, which was received on August 23<sup>rd</sup> in this office, I respectfully decline your demand to settle this case for \$5 million. Due to the excessive demand, this office does not and will not present a counteroffer.

If you would like to discuss any other matter in this case, kindly direct it to my attention at the above address.

Very truly yours,

MARY BETH BUCHANAN  
UNITED STATES ATTORNEY

  
PAUL E. SKIRTICH  
Assistant U.S. Attorney

November 14, 2007

Clerk of the Court  
United States Magistrate Judge  
Susan Paradise Baxter  
United States District Court Judge  
Sean J. McLaughlin  
Western District of Pennsylvania  
17 South Park Row, Room A-250  
Erie, Pa.  
16501

RE: CIVIL ACTION NO. 05-147-ERIE  
APPEAL ACTION NO. 07-1036  
DARRYL ORRIN BAKER v. UNITED STATES OF AMERICA, ET.AL.

Dear Clerk of the Court:

Please find inside the Plaintiff's motion for a **Bench Trial**.

Thank you very much.

Respectfully submitted

BY: Darryl Orrin Baker  
Darryl Orrin Baker  
Reg. No.# 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN  
55072

ENCL:  
cc: AUSA PAUL E. SKIRTICH